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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 198

MAURO JOHN MONTANA,

Petitioner,

vs.

WILLIAM P. ROGERS, Attorney General of the United States,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY FOR PETITIONER.

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SUMMARY OF ARGUMENT.

It is the position of the petitioner that under Section 2172 of the Revised Statutes of 1874, he, when he was born in Italy in 1906 during the effectiveness of that Act, became a United States Citizen by virtue of the citizenship of his mother; that the language "the children of persons" found in that Act is to be interpreted to include the singular or distributive and that it does not require both parents be citizens; that the language "are now, or have been" in the Act is capable and amenable to pros-

pective application, and in accordance with other constitutional and statutory provisions, requires prospective application in the interest of consistency and legality; that, alternatively, being born in the sole, actual custody of his citizen mother who was then estranged from the alien father, and such sole custody and estrangement having continued through petitioner's entry into the United States, and afterward, he became a citizen by derivation when he in the custody of his mother, returned to the United States, his mother, to all practical considerations, having thus "resumed" her citizenship, and that, therefore, petitioner became a citizen upon such entry under Section 5 of the Act of March 2, 1907; that, alternatively, he became a citizen five years after entry and the commencement of his residence in the United States under the provisions of Section 2 of the Act of May 24, 1934. It is the final position of the petitioner that valuable rights were intruded upon by a government official and that the improper conduct of such official caused petitioner's birth in Italy rather than the United States, and that the Court, under its equity jurisdiction should mend the wrong done petitioner by considering him as having been born in the United States, or, by considering him as having been in being from the time of conception in the United States.

ARGUMENT.

I.

PETITION ACQUIRED UNITED STATES CITIZENSHIP UNDER THE SECOND CLAUSE OF SECTION 2172 OF THE REVISED STATUTES OF 1874.

Petitioner, born in Italy in 1906, claims citizenship as the child of a mother (person) who was at the time of his birth a citizen of the United States under Section 2172 resting his claim on the ground that the Revised Statutes, of which such section is a part provides expressly that words importing the plural (persons) may include the singular, and on the ground that Section 2172, being susceptible of prospective application, must be prospectively applied.

A. The development of the law leading to the enactment of R. S. 2172.

The respondent errs in his primary approach to the background of the section of the revised statutes here under discussion (R. Br. 15 *et seq.*). The common law of the United States is the law as we took it from England at the time of settlement and our Declaration of Independence. It includes "those settled usages and modes of proceeding existing in the common and statute law of England, before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country." *Murray's Lessee, et al.* v. *Hoboken Land and Improvement Co.*, 59 U.S. 272, 277. At least as early as 1350 in England (25 Edward III, Stat. II (see R. Br. 16)), citizenship descended through the doctrine of citizenship *jure sanguinis*, and

citizenship *jure sanguinis* has been the common law doctrine for centuries along with the companion doctrine of citizenship *juri soli.*

Against the co-existing doctrines of *jure sanguinis* and *juri soli,* we then approach the successive legislation "guided by the principle that repeals by implication are not favored, and, indeed, that a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it is found that the existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory." *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.,* 204 U.S. 426, 437. This Court has indicated that a statute purporting to abolish a pre-existing right calls for a convincing explanation of that purpose. *Federal Power Comm.* v. *Niagara Mohawk Power Corp.,* 347 U.S. 239, 252-253.

Thus, the Acts of 1790, 1795 and of 1802 perpetuated the common-law doctrine of *jure sanguinis,* just as the Fourteenth Amendment perpetuated the doctrine of *juri soli.* The Acts, however, limited the right to pass citizenship by blood in excess of the next generation unless citizenship was coupled with United States residence by the father. But, fulfilling the limitation, such children were to be *considered* (regarded) citizens of the United States. The Act of 1855 *declared* (proclaimed) the children of United States citizen fathers, who had or had had United States residence, to be United States citizens.

But, all of the foregoing, except the Fourteenth Amendment, because of their express repeal in the Revised Statutes of 1874, are of but limited assistance to this argument. Rather, we should consider the statute here invoked

(Section 2172) against the background of the common law of *jure sanguinis,* and we find it a reaffirmation of that doctrine, without the qualification of the Acts of 1790, 1795 and 1802, requiring United States residence by the father.

> ". . . the children of persons who are now, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof."

B. The term "the children of persons" in the second clause of R. S. 2172 is the plural used in the distributive or generic sense.

The respondent's full argument, urging that the phrase quoted requires that both parents be citizens, resolves itself into one equivocation, "This use of the plural seems to have been deliberate" (R. Br. 23). Admitting, as he must, that research "has been unable to discover any judicial decisions construing the second clause of the 1802 Act (re-enacted in R. S. 2172)", he proceeds to the John Gould edition of 2 Kent, *Commentaries,* which urges the more comprehensive and liberal interpretation that "persons" in the Act of 1802 be considered to include the singular in his comments Mr. Gould uses the casual example of the father probably occasioned by the presence of the proviso occurring in the Act of 1802 that required residence in the United States by the father, a proviso not present in Section 2172) (R. Br. 24-26).

The respondent avoids the basic fact that in the drafting of statutes, the use of the plural to include the singular or generic is a commonplace, and the intent and operation of a statute drafted in such plural terms is usually so understood. He also avoids the fact that such usual understanding is made positive and specific in the Revised Statutes of which § 2172 is a part. Section 1 thereof

expressly provides that "In determining the meaning of the revised statutes . . . words importing the plural number may include the singular."

Indeed, Mr. Horace Binney, in his article "The Alienigenae of the United States", 2 Am. L. Reg. 193 (1854), much relied upon by Respondent (R. Br. 19, 26), construing this clause as it appeared in the Act of April 14, 1802 interpreted the language "children of persons" as we urge. In voicing his opposition to the statute, he said:

> "All such descriptions as 'the children of persons who are citizens of the United States,' ought most carefully to be avoided in such a statute; for as the words 'children' must be taken distributively to comprehend any child, so 'persons who are citizens' may be understood as also used distributively to comprehend any person, whether father or mother, and thus to make the child of an alien father and citizen mother a citizen." (2 Am. L. Reg. at p. 208.)

The respondent's argument requiring both parents be citizens if carried to its logical conclusion would result in the absurdity that even if both father and mother were American citizens, still they would have to have more than one child to come within the terms of the statute because, applying the reasoning of the respondent, *one* child of American parents would not be comprehended within the term "children".

We submit it is completely apparent that "children of persons" and "the child of a person" are merely alternative modes of expression, that their meaning is exactly the same and that the rule expressed in Section 1 of the Revised Statutes emphasizes the identity of meaning when it says "words importing the plural may include the singular."

To illustrate the confusion resulting from the respondent's attempts to avoid basic statutory construction, and indeed, statutory mandate incorporated in Section 1, the respondent offers this Court two alternatives to his proposed requirement that "persons" means both parents (R. Br. 31). He suggests that "persons" means the father alone, predicated on only the quotation from 2 Kent Commentaries 14th Ed. (R. Br. 25-26), which we have discussed. This first alternative runs counter to basic rules of statutory construction. The word "fathers" is expressly used in Section 1993 of the same Revised Statutes. Respondent urges that "persons" in Section 2172 should also be limited to mean "fathers". In order to bring about the effect contended for by the respondent, it would be necessary to impliedly limit, as the statute specifically does in the earlier section, a provision in the later section. The presence of the limitation in the one part and its absence in the other is an argument against reading the latter provision as implying the limitation. *United States* v. *Atchison, T. & S. F. R. Co.*, 220 U.S. 37.

The second proposed alternative is that "persons" means a naturalized mother, who has theretofore terminated her marriage with an alien father and obtained custody of the child. But this counters reason. The alien father is still a person and the child is still the child of that person. We submit the concession that a divorced citizen mother can pass citizenship to her foreign-born child under this section confirms our argument, for the character and existence of the alien husband cannot be denied.

Some comment is required on respondent's analysis of the cases interpreting the phrase "children of persons" in the first clause of § 2172 as including the distributive. (R. Br. 26-30). The respondent makes the passage of

citizenship through the mother's naturalization dependent upon the fortuity of the alien father's early demise or upon the legal severance of the marriage ties. The interpretation amends the statute, which makes no such qualification. The statute does not grant citizenship through the death of an alien father, but through the naturalization of the mother to her child *if a minor at the time of naturalization.* If we attempt to reconcile the respondent's analysis to the statute, as in *Citizenship of R. Bryan Owen,* 36 Op. Atty. Gen. 197, and if the elder Owen had enjoyed better health, R. Bryan could conceivably have had an inchoate right to citizenship extending into his old age, dependent upon the longevity of his father and his father's pre-deceasing Mrs. Owen, which would be retroactive to the time of naturalization.

In like manner, if the first clause really was intended to be interpreted only in the plural, of what assistance is divorce? The child continues to be the child of his alien parent, whatever the estrangement between the parents. His mother's remarriage to a citizen does not make him the child of the second husband, so as to satisfy the plural interpretation urged.

Respondent concludes his argument on this point with a final suggestion, the only result of which would be the complete obliteration of Section 1993. Persisting in his argument that only a citizen father can bestow citizenship on the child born abroad, he suggests that Sections 2172 and 1993 mean the same thing because "during the period from 1855 to 1922 . . . the citizenship of the father . . . conferred citizenship upon his wife under R. S. 1994" (R. Br. 30). Therefore, the respondent argues, Sections 2172 and 1993 both performed the same function, the conferring of citizenship upon the child born abroad, *only* through the citizen father, because the citizenship of the

father endowed the alien mother with citizenship, and the provisions of Section 2172 were thereby satisfied. But that does not explain the requirement under Section 1993 for prior United States residence by the father if he is the source of citizenship, a proviso that does not appear in Section 2172. If respondent's theory is carried to a logical conclusion, a citizen father who had never resided in the United States, could, notwithstanding the limitation of Section 1993, pass citizenship to his child born abroad by virtue of the provisions of Section 2172 and the automatic naturalization of his alien wife.

We respectfully suggest that the respondent's arguments on this point do not withstand careful scrutiny. We cannot say with certainty what was the reason for the limiting proviso in R. S. 1993. It, perhaps, was a recognition of the fuller freedom of choice of residence in the father. We submit that the distributive interpretation urged by petitioner, is reasonable, logical and legal and should be employed.

C. The second clause of R. S. 2172 should be applied prospectively.

Urging retrospective operation of R. S. 2172, the respondent relies primarily on the interpretation of Mr. Binney, congressional debate reports, certain *obitur dicta* of this Court, and also the expressive language of R. S. 1993.

The respondent urges cases and articles upon us in support of the proposition of retrospective application (R. Br. 36). We do not see the application of *D'Alessio* v. *Lehman*, N.D. Ohio, 183 F. Supp. 345. In *United States ex rel. Guest* v. *Perkins*, D.D.C., 17 F. Supp. 177, the only reference to retrospective application of R. S. 2172 was the court's repeating the contention of the petitioner. The

ruling, itself, relied on the father's never having resided in the United States. The remainder of respondent's authorities include a *dictum* of Chief Justice Taft in *Weedin* v. *Chin Bow*, 274 U.S. 657, which relied upon Mr. Binney's article, *supra*, and which was, in turn, relied upon in *Mock Gum Ying* v. *Cahill*, 9 Cir., 81 F. 2d 940; and 2 Kent Commentaries (14th Ed). A very short examination will reveal that Mr. Binney and 2 Kent Commentaries (14th Ed), as well as Chief Justice Taft, were referring only to the Act of 1802 and not to Section 2172 of the Revised Statutes. *Mock Gum Ying* v. *Cahill, supra*, does stand for the proposition that Section 2172 is to be retrospectively applied only. It is our function here to convince this Court otherwise. But it may be noted that the collective interpretation urged by respondent (R. Br. 22-32) did not enter into the determnation of the Ninth Circuit.

Respondent urges it argument for retrospective application of R. S. 2172 because certain statements by congressmen about the Act of 1802 resolved this point against the interpretation for which we contend. The congressmen's statements were made in 1855 down to 1934, with the notable exception of remarks concurrent or current with the enactment of R. S. 2172. The respondent's argument, in the main, is that legislative action in 1855 settled the interpretation to be accorded to the Act of 1802. This is, of course, not the law. Nothing that any later congress can say or do can affect the meaning of unambiguous language used in the Act of 1802. The meaning of such language must be determined by the courts *when a proper case arises*. We may here note that the Congress of 1855 did not see fit to repeal the Act of 1802, and consequently its meaning is open to judicial interpretation as a matter *res integra*. Further, urging the repeal of the Act of 1802 by the Act of 1855, respondent

summarily ignores the enactment of § 2172 in the Revised Statutes of 1874.

Finally, respondent impliedly urges that "heretofore born" and "hereafter to be born" in R. S. 1993 was the kind of language required for retrospective and prospective application, and that the word "now are or have been" in R. S. 2172 will not avail other than for retrospective application. The respondent has ignored our argument urging this Court to employ accepted statutory construction (P. Br. 10-12). He predicates his argument on the simple expedient of a failure to employ "heretofore" and "hereafter to be" found in R. S. 1993 (though unusual in statutory drafting). We, therefore, invite the Court to consider the language of R. S. 2172 ("are now or have been") in juxtaposition with nationality provisions admittedly prospective. The section speaks in the alternative ("are now or have been") and we take the alternatives separately.

". . . persons who *now are* . . . citizens" (R. S. 2172) speaks of the present existence of a state or condition. ". . . persons *born* . . . in the United States" (14th Amendment) speaks of a present state or condition of existence. Language-wise there appears no reason why the Fourteenth Amendment to the Constitution should be conclusively given prospective application to the exclusion of any argument to the contrary, and R. S. 2172 restricted to retrospective application.

We submit the alternative: "children of persons who . . . *have been* citizens shall . . . be considered as citizens" (R. S. 2172, 2nd clause) and ". . . children of persons who *have been* duly naturalized . . . shall . . . be considered as citizens" (R. S. 2172, 1st clause). Again, language-wise there appears no reason why the latter should admittedly be given prospective application, and the other restricted

to retrospective application. We remind the court that Mrs. Montana, at the time of the birth of her petitioner son, had been a citizen for all of her fifteen years.

Under either alternative in the second clause of R. S. 2172, petitioner qualifies and under either alternative, language, logic and consistent interpretation demands prospective application.

II.

THE PETITIONER BECAME A CITIZEN UPON HIS MOTHER'S RESUMING UNITED STATES RESIDENCE UNDER SECTION 5 OF THE ACT OF MARCH 2, 1907; OR, FIVE YEARS AFTER HE COMMENCED RESIDING IN THE UNITED STATES UNDER THE PROVISION OF THE ACT OF MAY 24, 1934.

It is the submission of the petitioner that upon the separation of his parents, his sole custody was in his mother. Thereafter, he entered the United States with her and in her sole custody and proceeded to reside with her and domiciled with her, while in her sole custody and during his minority. While Mrs. Montana, at that time, could not technically resume the citizenship she had never lost and thereby bestow citizenship on the petitioner, she could to all practical circumstances, resume her American citizenship by her permanent return to the United States under the ruling in *Petition of Black*, D. Minn., 64 F. Supp. 518. The Court of Appeals for the Seventh Circuit rejects the practical approach of the *Black* case, in adhering to the letter of literal "resumption" (R. 55). We submit, in accordance with the *Black* case, that the holding in this cause, "unduly emphasize[s] form rather than substance." (64 F. Supp. at 521).

The respondent urges two avenues of resistence to our submission. He emphasizes that the marriage of pe-

titioner's parents, their separation, his birth, his return to the United States and the subsequent reconciliation of his parents all ante-dated the act of March 2, 1907, and particularly Section 5 thereof. This argument overlooks the fact that the provisions of the Act have been found to be declaratory of the Common Law. *Petition of Drysdale* D.C.E.D. Mich., 20 F. 2d 957, 958. The respondent further argues that custody in the mother will not suffice to confer citizenship, in the absence of absolute divorce of the alien father and the citizen mother, but later concedes the statute is satisfied by mutual separation, as in *U. S. ex rel Gilest* v. *Perkins,* D.D.C., 17 F. Supp. 177 (R. Br. 45-46). It appears that the essence of this line of argument is that separation of the parents, custody in the citizen parent and resumption of the United States residence all coinciding for the bestowing of citizenship upon the child born abroad, can all be defeated if subsequently the citizen mother and the alien father reconcile, though it would appear that marriage to another alien would not defeat the child's citizenship. It is our respectful submission that the coincidence of the elements that satisfy the spirit of the act (the citizenship of the parent in custody; the separation of the parents and the resumption of residence in the United States) acts to bestow citizenship on the child born abroad, and nothing in the law, save the child's own election, provides for defeat of that bestowal.

The petitioner makes the further contention that, in any event, he became a citizen under the Act of May 24, 1934. This Act eliminatees the necessity of termination of the marriage between the citizen parent and the alien spouse. Further, it is not contested by the respondent that Section 5 of the 1934 Act applied to cases arising before 1934 as well as after. The language interpreted

by this Court in *Kelly* v. *Owens*, 74 U.S. 496 ("shall be deemed") is identical with that of the 1934 Act. We urge identical interpretation.

> "As we construe this act, it confers the privileges of citizenship upon women married to citizens of the United States, if they are of the class of persons for whose naturalization the previous acts of Congress provide. The terms 'married', or 'who shall be married', do not refer, in our judgment, to the time when the ceremony of marriage is celebrated, but to a state of marriage. *They mean that, whatever a woman, who under previous acts might be naturalized, is in a state of marriage to a citizen, whether his citizenship existed at the passage of the act or subsequently, or before or after the marriage, she becomes, by that fact, a citizen also.*" . . . (74 U. S. at 498.)

The respondent's sole reliance is upon the literal resumption of citizenship, notwithstanding the holding in *Petition of Black*, D. Minn. 64 F. Supp. 518, that "The resumption of American citizenship by the mother under these circumstances is just as real and effective within the intent of the Act of May 24, 1934 . . .", and notwithstanding the Attorney General's opinion in *Matter of Coll y Picard*, 37 Ops. Atty. Gen. 90 that the mother should be treated as precisely in the same situation as one who had resumed her citizenship.

The petitioner respectfully submits that the facts of this case satisfy the spirit and intent of both statutes, and that he is a citizen of the United States by derivation of his mother's citizenship.

III.

THE DOCTRINE OF ESTOPPEL IS APPROPRIATELY INTERPOSED.

The respondent's argument on this point, chameleon-like, colors the facts to suit the law he proposes.

1. He says "the trial judge, as fact finder, does not appear to have credited the claim that Mrs. Montana was denied the passport in question." (R. Br. 57). The source of this statement, is not furnished, nor does it appear from the record that her testimony was questioned by either the respondent nor the judge at the trial level. The sole objections to the proof went to relevancy (R. 24, 27, 32) and competency (R. 27) the only cross-examination went to the birth of her other children in the United States (R. 34-35); and the only manifestation by the trial court as to the basis of its adverse ruling was the application of the law to the facts testified to or admitted:

> "By the Court: I think I understand the problem and am familiar with the statutes, and the suit will be dismissed." (R. 35).
>
> "By the Court: You have your record, and I have let you put everything else in there. It is up to you to go to the Court of Appeals." (R. 36)
>
> "By the Court: All you have to do is briefly state what you have told me. That is the law. I cannot by any stretch of the imagination consider your point of view. To me it is not retroactive.
>
> "It is very clear to me that the father is not a citizen, was not a citizen at the time the child was born. There is no question in my mind about it. He isn't a citizen now." (R. 50).

It is respectfully submitted that the argument for a finding of incredibility is not only not supported, it is rebutted by the record.

2. He urges Mrs. Montana's interest in the outcome of the suit because she has "five other living children, all of whom were born in Chicago" (R. Br. 57). Of course, she is interested in the outcome of the suit and her interest would be the same without other children, and with other children born elsewhere. But the trial court made no indication that he "discounted" her testimony on that score, or on any score.

3. He urges that the language ascribed to the consul "'I am sorry, Mrs., you cannot go in that condition • • •. You come back after you get your baby.'". (R. 23) is consistent with a *suggestion* that she wasn't really well enough to travel. (R. Br. 6, 58-59). It certainly does not read as a *suggestion*, nor would it have the impact of a suggestion on a fifteen year old girl in a foreign country.

4. He again urges the incredibility of the testimony because there was no occasion for Mrs. Montana to apply for a passport, that no one needed one to get in and out of the United States at that time. (R. Br. 59-60). Yet the respondent agrees that passports were issued by the United States at that time for identification and convenience and to comply with the internal regulations of various countries, citing 3 Moore, *International Law Digest* 856 and 2 Hyde, *International Law* (2d Rev. Ed. 1945) 1188. Respondent argues that if Italy had required a passport the consul would have issued one. (R. Br. 60). The testimony is that he *did* issue after the birth of petitioner, and the necessary inference is that it must have been required. If the testimony of its issuance is questioned, it should have been easily rebutted.

5. The respondent further argues that Mrs. Montana's father, a United States citizen, couldn't have gotten a passport in a foreign country. (R. Br. 60-61). The fact is that he, by birth, was also an Italian citizen,

Italian law not recognizing the right of expatriation until 1912.

6. The respondent further states Mrs. Montana could have gotten a passport in the "little town" if it had a consular officer, so she didn't have to go to Naples. (R. Br. 61). The "little town" was identified as Acerra, Italy (R. 24). If his argument has merit, it could have been easily supported.

7. Finally, the respondent contends there can be no estoppel, because even if the consul had granted the passport, there would have been no assurance that the petitioner would have been born in the United States, and only improper conduct which directly leads to a certain course of conduct is available for estoppel (R. Br. 62). If the law requires that kind of assurance, especially as to the time and place of the birth of a child, there can, of course, be no estoppel. But, had the consul given her her passport and had she travelled directly to the United States (rather than an unlikely excursionary cruise) and could she have made assurances that her health, stamina and condition were such as they eventually showed themselves to be, then the consul's improper conduct did, in fact, directly lead to a certain course of conduct causing petitioner's birth in Italy.

CONCLUSION.

Wherefore, for the foregoing reasons, it is respectfully submitted that the judgment below be reversed and this cause remanded with instructions for the entry of a judgment declaring petitioner to be a Citizen of the United States.

Respectfully submitted,

ANNA R. LAVIN
Attorney for Petitioner.

SUPREME COURT OF THE UNITED STATES

No. 198.—October Term, 1960.

Mauro John Montana, Petitioner, *v.* Robert F. Kennedy.	On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

[May 22, 1961.]

Mr. Justice Harlan delivered the opinion of the Court.

Having been ordered deported as an alien on grounds which are not contested, petitioner, claiming to be a citizen, brought the present declaratory judgment action under 8 U. S. C. § 1503 to determine his citizenship status.

Petitioner, whose mother is a native-born United States citizen and whose father is a citizen of Italy (their marriage having been in the United States), was born in Italy in 1906 while his parents were temporarily residing there, and entered the United States with his mother later the same year. He has continuously resided in the United States since that time and has never been naturalized. His claim of United States citizenship is based primarily upon two statutes: (1) Section 2172 of the Revised Statutes (1878 ed.),[1] and (2) Section 5 of an Act of 1907.[2] The Court of Appeals found that neither statute obtained as to one in the circumstances of this petitioner, 278 F. 2d 68. We granted certiorari to review that conclusion, 364 U. S. 861, in view of the apparent harshness of the result entailed. For reasons given hereafter, we agree with the Court of Appeals.

[1] See p. —, *infra*.

[2] See p. —, *infra*.

I.

In 1874 Congress re-enacted two statutes which seem to defy complete reconciliation. R. S. § 2172, a re-enactment of § 4 of an Act of April 14, 1802 (2 Stat. 155), provided that

> "children of *persons* who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof. . . ." (Emphasis added.)

R. S. § 1993, substantially a re-enactment of § 1 of an Act of February 10, 1855 (10 Stat. 604), provided that

> "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose *fathers* were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States." (Emphasis added.)

Since R. S. § 2172 spoke broadly of children of citizen "persons"—perhaps citizen mothers as well as citizen fathers—while R. S. § 1993 spoke only of children of citizen "fathers" (and even then embraced only citizen fathers who had been United States residents), there is a conflict in the apparent reach of the simultaneously re-enacted provisions.

In this circumstance petitioner, claiming that "persons" in R. S. § 2172 included, in the disjunctive, both citizen fathers and mothers, contends that we are faced with deciding either that R. S. § 1993 simply *repeats*, with modifications, that part of R. S. § 2172 relating to "fathers," (leaving its provisions relating to "mothers" intact), or that it *repeals* that part of R. S. § 2172 relat-

ing to "mothers." He suggests that we make the former choice to avoid the admitted severity of deporting a fifty-five-year-old man who has resided in this country since he was an infant. The Government, on the other hand, asserts that R. S. § 2172 should be read as embracing only children *both* of whose parents were American citizens. Whatever the force of these opposing contentions may be, other considerations unmistakably lead to the conclusion that petitioner's claim to citizenship under R. S. § 2172 must be rejected.

In 1854 Horace Binney, one of the country's leading lawyers and a recognized authority on the immigration laws, published an article entitled "The Alienigenae of the United States" [3] in which he argued that the words "who now are or have been" in the 1802 predecessor of R. S. § 2172 had the effect of granting citizenship to the foreign-born children only of persons who were citizens of the United States *on or before* the effective date of the 1802 statute (April 14, 1802), in other words that the statute had no prospective application. Foreign-born children of persons who became American citizens between April 14, 1802 and 1854, were aliens, Mr. Binney argued. In 1855 Congress responded to the situation by enacting the predecessor (10 Stat. 604) of R. S. § 1993.[4] The provision had retroactive as well as prospective effect.

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[3] 2 American Law Register 193.

[4] That the enacting Congress accepted and acted upon the view that the Act of 1802 (later re-enacted as R. S. § 2172) had no effect as to parents who became citizens after 1802 is clear from the following statement of Congressman Cutting:

". . . the children of a man [U. S. citizen] who happened to be in the world on the 14th of April, 1802, born abroad, are American citizens, while the children of persons born on the 15th of April, 1802, are aliens to the country." 32 Cong. Globe 170, 33d Cong., 1st Sess., Jan. 13, 1854.

but was clearly intended to apply only to children of citizen *fathers.*

The view of Mr. Binney and the 1855 Congress that the Act of 1802 had no application to the children of persons who were not citizens in 1802 has found acceptance in the decisions of this Court. See *United States* v. *Wong Kim Ark*, 169 U. S. 649, 673–674; *Weedin* v. *Chin Bow*, 274 U. S. 657, 663–664; see also *Ying* v. *Cahill*, 81 F. 2d 940. The commentators have agreed. See 2 Kent, Commentaries, at 53; 3 Hackworth, Digest of International Law, § 222; cf. *Matter of Owen*, 36 Op. Atty. Gen. 197, 200. Finally Congress has repeatedly stated and acted upon that premise. See, *e. g.*, H. R. Rep. No. 1110, 67th Cong., 2d Sess., at p. 3. Indeed when, in 1934, Congress finally granted citizenship rights to the foreign-born children of citizen mothers, 48 Stat. 797, it not only specifically made the provision prospective, but further made clear its view that this was a reversal of prior law. See H. R. Rep. No. 131, 73d Cong., 1st Sess., p. 2, and S. Rep. No. 865, 73d Cong., 2d Sess., p. 1.

Whatever may have been the reason for the 1874 re-enactment of the Act of 1802, as R. S. § 2172, we find nothing in that action which suggests a purpose to reverse the structure of inherited citizenship that Congress created in 1855 and recognized and reaffirmed until 1934. On this basis and in the light of our precedents, we hold that at the time of petitioner's birth in 1906, R. S. § 1993 provided the sole source of inherited citizenship status for

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[5] Congressman Cutting explained:

"In the reign of Victoria, in the year 1844, the English parliament provided that the children of English mothers, though married to foreigners, should have the rights and privileges of English subjects, though born out of allegiance. *I have not, in this bill, gone to that extent, as the House will have observed from the reading of it.*" (Emphasis added.) 32 Cong. Globe 170, 33d Cong., 1st Sess.

foreign-born children of American parents. As the foreign-born child of an alien father that statute cannot avail this petitioner.

II.

Petitioner's second ground for claiming citizenship is founded upon § 5 of an Act of March 2, 1907 (34 Stat. 1229), which provided in relevant part "that a child born without the United States of alien parents shall be deemed a citizen of the United States by virtue of . . . resumption of American citizenship by the parent. . . ."[6] Petitioner's claim in this regard necessarily depends upon our finding (1) that his mother was an alien at the time of his birth, having lost her citizenship either when she married an alien or when she traveled abroad with her alien husband in 1906, and (2) that his mother resumed her citizenship on her return to the United States.

It is sufficient to dispose of the contention that we find that mere marriage to an alien, without change of domicile, did not terminate the citizenship of an American woman either at the time of petitioner's birth or his mother's return to the United States, both of which occurred in 1906.[7] This view, which is supported by the weight of authority,[8] is indeed not contested by peti-

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[6] In the context of the section it is clear that the word "parent" refers both to fathers and mothers. Section 2 of the Act of May 24, 1934 (48 Stat. 797), on which petitioner alternatively relies, is in all respects here material a re-enactment of the above provision.

[7] By § 3 of the Act of March 2, 1907 (34 Stat. 1228), marriage to an alien *did* terminate the citizenship of an American woman.

[8] See, *e. g.*, *Comitis* v. *Parkerson*, 56 F. 556, 559–560 (D. C. E. D. La.), writ of error dismissed *sub nom. Comitiz* v. *Parkerson*, 163 U. S. 681; *Ruckgaber* v. *Moore*, 104 F. 947, 948–949 (D. C. E. D. N. Y.), affirmed, 114 F. 1020 (C. A. 2d Cir.); *Wallenburg* v. *Missouri Pacific R. Co.*, 159 F. 217, 219 (C. C. D. Neb.); *In re Fitzroy*, 4 F. 2d 541, 542 (D. C. D. Mass.); *In re Lynch*, 31 F. 2d 762 (D. C. S. D.

tioner, who instead asks this Court to construe § 5 of the 1907 Act so as to avoid the obvious paradox of giving preferred treatment to the children of a woman who has lost her citizenship over that afforded to the children of a woman who has never lost her citizenship.[9] Paradoxical though this may be, we have no power to "construe" away the unambiguous statutory requirement of § 5 that petitioner's mother must have lost her citizenship at the time of his birth.[10]

III.

Petitioner makes a further contention. It is urged that the Government should not be heard to say that petitioner was born outside the United States because of its own misconduct. Petitioner's mother testified that she had been prevented from leaving Italy prior to petitioner's birth by the refusal of an American Consular Officer to issue her a passport because of her pregnant condition. However, it is uncontested that the United States did not require a passport for a citizen to return to

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Cal.); *Petition of Zogbaum*, 32 F. 2d 911, 912–913; *In re Wright*, 19 F. Supp. 224, 225 (D. C. E. D. Pa.); *Watkins* v. *Morgenthau*, 56 F. Supp. 529, 530–531 (D. C. E. D. Pa.).

[9] Such a construction was espoused by Attorney General William D. Mitchell in 1933, 37 Op. Atty. Gen. 90, and is also indicated in two District Court cases. See *Petition of Black*, 64 F. Supp. 518; *Petition of Donsky*, 77 F. Supp. 832. But see *D'Alessio* v. *Lehman*, 183 F. Supp. 345, which takes a contrary view.

[10] Moreover, even if petitioner's mother had suffered a loss of citizenship which was later reacquired, petitioner's case would still not come within the statutory definition of "resumption of American citizenship." Congress gave explicit content to this requirement of § 5 of the Act of 1907, § 3 of the same Act providing:

"*At the termination of the marital relation* she may resume her American citizenship. . . ." (Emphasis added.) 34 Stat. 1228. Petitioner's mother has never terminated her marital relation with petitioner's alien father.

the country in 1906. Moreover, petitioner has presented no evidence of any Italian requirement of an American passport to leave Italy at that time. In this light the testimony by petitioner's mother as to what may have been only the consular official's well-meant advice—"I am sorry, Mrs., you cannot [return to the United States] in that condition"—falls far short of misconduct such as might prevent the United States from relying on petitioner's foreign birth. In this situation, we need not stop to inquire whether, as some lower courts have held, there may be circumstances in which the United States is estopped to deny citizenship because of the conduct of its officials.[11]

Affirmed.

MR. JUSTICE DOUGLAS dissents.

[11] See, *e. g.*, *Podea* v. *Acheson*, 179 F 2d 306; *Lee You Fee* v. *Dulles*, 236 F. 2d 885, 887.